Supreme Court, U.S.
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NO. 90-1074

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

WAYNE ESTELLE, WARDEN

Petitioner,

v.

MARK OWEN McGUIRE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Ann Hardgrove Voris*
Attorney for Respondent
MORRIS TAYLOR HAYS & HIGAKI
One Bush Street, Suite 200
San Francisco, California 94104
(415) 291-0500

*Counsel of Record

QUESTION PRESENTED

Was there a denial of due process of law under the Constitution of the United States when evidence of prior injuries to the victim were admitted without evidence linking Respondent to the prior injuries and the jury was instructed to use that evidence to convict him?

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Respondent, Mark Owen McGuire, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported that McGuire v. Estelle, 902 Fed.2d 749 (9th Cir. 1990) and attached to the Petition for Writ of Certiorari.

On July 7, 1981, Mark and Daisy McGuire brought their lifeless six month old daughter Tori McGuire, into the emergency room of Kaiser Hospital in Hayward, California. The child was immediately taken in for emergency treatment and the screening nurse took a history. The history provided by the parents to the screening nurse was inconsistent with the injuries presented. The police were called by emergency room personnel because they were presented with a bruised, lifeless baby and an inconsistent history. The condition of the child and the inconsistent history are indicia that the child died of child abuse. The only real question was who did it.

The police instructed emergency room personnel not to tell the McGuires that Tori was dead. The police then questioned Mark and Daisy McGuire and searched their home. Nearly two hours after the initial questioning, the parents were told that their child was dead.

Statements were obtained from Mark and Daisy McGuire without benefit of Miranda warnings, under the pretext that the police were merely investigating and did not yet know a crime had been committed. Miranda v. Arizona, 384 U.S. 436 (1965). In the course of these interviews, McGuire made statements denying knowledge of and speculating as to the source of the injuries to the baby. McGuire did not testify at trial.

The statements made by McGuire to the police were introduced in the prosecution's case in chief. The prosecutor then introduced prior injuries to the victim to rebut a potential defense of accident. Neither the statements nor the injuries were necessary to establish the corpus delicti of murder, or the Battered Child Syndrome.

At the preliminary hearing Daisy McGuire refused to testify without benefit of transactional immunity. Without questioning Daisy with regard to her testimony, the prosecutor gave her transactional immunity. Daisy did not implicate Mark McGuire at the preliminary hearing. She was not asked and did not deny hitting the baby herself at the preliminary hearing. The only time she denied hitting the baby was when she was questioned by the police before she was told that Tori was dead. At trial, still with benefit of transactional immunity, Daisy testified that she herself had hit the baby. She said that it was hot, she was

pregnant, the TV was broken, and she beat the baby until she stopped crying.

Incidents of violent arguments between Mark and Daisy were then introduced to impeach her testimony for the purpose of establishing that she was afraid of him. Daisy never retracted her story even though their son, born after the preliminary hearing, was adopted due to her testimony that she beat Tori.

Evidence of prior injuries to Tori McGuire, including healing rib fractures and rectal tearing, was initially admitted for the limited purpose of establishing the Battered Child Syndrome. In spite of the initial limited purpose, there was no limiting instruction. The jury was instructed that if it connected McGuire with the "other offenses," including the prior injuries to the baby and prior violence to his wife, it could find him guilty of murder. The Court elected to permit the jury to use the Battered Child Syndrome evidence to identify McGuire as the perpetrator of both the prior injuries and the murder. The California Court of Appeal upheld the conviction and the State Supreme Court denied hearing.

McGuire filed a petition for writ of habeas corpus before the United States District Court of the Honorable Thelton E. Henderson. After granting the initial Order to Show Cause, Judge Henderson

denied the petition.

The Ninth Circuit twice reversed the denial of the Writ. In its first opinion, filed May 8, 1989, the Ninth Circuit Panel held that McGuire was denied due process by admission of this evidence and its associated jury instruction. (Petition, A-26.) The Attorney General requested rehearing on the grounds that the panel failed to consider federal authority. (App. B, page 16.)

One year later, the Ninth Circuit Panel wrote a new opinion. The present objection is that the panel relies too heavily on federal authority. Rehearing was denied, and a dissent was published by two Ninth Circuit Justices, who were not on the decision making panel, opposing the denial.

No matter the authority relied upon, state or federal, the use of evidence of prior injuries to the victim, without evidence linking McGuire to the infliction of those injuries, coupled with an instruction to the jury to connect such evidence to the murder is a denial of due process of law.[1]

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[1]See Appendix B, pages 1 and 2 for full text of the California Evidence Code §1101 and the Federal Rules of Evidence §404 for comparison.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT WITH STATE OR FEDERAL LAW REQUIRING THIS COURTS' SUPERVISION

Petitioner argues that the Ninth Circuit ignored the State's interpretation of its own law and relied upon the Federal Rules of Evidence to reverse a state murder conviction. (Pet. 9)

Petitioner fails to comply with the requirements of Supreme Court Rule 10 that the petition specify a conflict with other laws or departure from the accepted course of judicial proceeding calling for this Courts' supervision.

The petitioner misstates the Ninth Circuit Opinion, the state procedures and the history of Battered Child Syndrome cases. Petitioner has argued incessantly that because Battered Child Syndrome evidence is admissible, it must be admitted in this case. The Ninth Circuit Panel understood that the California courts have admitted evidence of Battered Child Syndrome for limited purposes. In reviewing the California cases which permit evidence of the Battered Child Syndrome the Panel recognized that:

> These cases demonstrate that the California Courts have been careful to limit proof of the syndrome to show that the child had not accidentally suffered the injuries. (Pet. A-23)

The evidence was admitted in the trial court without analysis under California Evidence Code §1101(b). In fact, the trial court asked

the prosecutor about §1101(b), and the prosecutor told the court that it did not apply to child murder cases. The Ninth Circuit Panel stated that:

> The prejudicial quality of the evidence was exacerbated by an instruction given to the jury... . This instruction specifically told the jury that if it thought McGuire committed the other two "offenses" they could find him guilty of the charged offense.

The evidence was initially admitted to prove the Battered Child Syndrome. There was no analysis as to its purpose; the court instructed the jury to use it to convict. This denied due process.

II. THE CALIFORNIA AND FEDERAL CASES PERMITTING USE OF BATTERED CHILD SYNDROME EVIDENCE REQUIRE ANALYSIS FOR RELEVANCE AND PREJUDICE.

Petitioner argues that a diagnosis of Battered Child Syndrome "indicates simply that the child did not suffer her injuries by accidental means." (Pet-9)

Battered Child Syndrome was established by the uncontroverted testimony of the emergency room physician and the coroner that the baby was not killed accidentally. There was no conflict or confusion regarding the medical evidence. People v. Wright, 60 Cal.App.3d 6 (1976). There was no question that the child's death was caused by abuse. The prosecutor then introduced, over objection, McGuire's equivocal statements that he did not know how the baby was injured. The prosecutor then used the prior injuries to rebut an anticipated but not forthcoming claim of accident.

The California Supreme Court recognized the Battered Child Syndrome judicially as a medical diagnosis in a civil medical malpractice case. Landeros v. Flood, 17 Cal.3d 409 (1976). Its use was ordinarily confined to cases under the California child abuse statute.[2] The cases relied upon by the trial court, permitting similar conduct to prove non-accidental death, interpreted the child abuse statute. People v. Ewing, 72 Cal.App.3d 714, 717 (1977); People v. Jackson, 18 Cal.App.3d 504 (1970); People v. Shockley, 79 Cal.App.3d 669, 674 (1978); People v. Atkins, 53 Cal.App.3d 348, 360 (1975).

The medical evidence clearly established that this child was beaten to death. Under all authority, federal and state, the admission of prior injuries and prior act evidence must be linked to a specific matter at issue in the case. Petitioner argues that United States v. Boise, permits federal prosecutors to use evidence prohibited to state prosecutors by the opinion set forth in McGuire v. Estelle. United States v. Boise, 916 Fed.2d 497 (9th Cir. 1990). Boise, like all its predecessor cases, allowed evidence of prior

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[2] Penal Code Section 273a states: "(1) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison for 2, 3 or 4 years."

injuries only to rebut a fully articulated accident presented by defense medical experts and defense testimony.

The Battered Child Syndrome does not provide evidence of who injured the child. When identity of the primary caretaker is not at issue, it may be used to rebut defenses of accident, misdiagnosis or lack of intent. United States v. Boise, supra, 916 Fed.2d at 503. Ordinarily, the exception is invoked when "the accused admits he did the acts charged, but denies the intent necessary to constitute a crime, or contends that he did the acts accidentally." United States v. Leight, 818 Fed.2d 1297, 1301 (7th Cir., 1987).

McGuire did not introduce conflicting medical evidence. See, e.g., United States v. Boise, supra, 916 F.2d at 500; United States v. Leight, 818 Fed.2d 1297, 1300 (7th Cir., 1987); United States v. Woods, 484 Fed.2d 127 (4th Cir. 1973). He did not contend that the injuries were inflicted accidentally. He did not introduce evidence that his wife committed the crime; she was a prosecution witness, under complete immunity.

The trial court failed to consider whether prior injuries were relevant to any issue in the case, or whether they were simply being used as character evidence. The trial court was persuaded that once it found Battered Child Syndrome, there was no need to

analyze the evidence. The minority dissent states that the evidence was admitted to show that McGuire had committed similar prior bad acts. (Pet. 16, citing A-54). The purpose of the state and federal rules is specifically to prevent use of such evidence for the purpose of showing similar prior bad acts.

As trial counsel argued, and as has been argued throughout the pendency of this matter, this is improper propensity evidence. The argument that the prior injuries are admissible to show prior bad acts bolsters McGuire's contention that this evidence was used precisely for improper, inadmissible purposes. There was no connection between McGuire and the other injuries. Evidence of the injuries was not needed to prove the crime, nor to rebut any defense. They were introduced only to show that he was a bad man who should be convicted of murder.

III. THE NINTH CIRCUIT PANEL DID NOT EXCEED ITS AUTHORITY; DUE PROCESS REQUIREMENTS WERE NOT MET

It is argued that the panel may not "peer majestically over the state court's shoulder." (Pet. 11) It is implied that the Ninth Circuit Panel is reversing the conviction based on violations of the Federal Rules of Evidence.

It is axiomatic that federal courts may intervene in the state judicial process to correct wrongs of a constitutional dimension. Wainwright v. Goode, 464 U.S. 78, 83 (1983). The use of prior

injuries to brand McGuire as a child abuser without any evidence that he previously injured the child, with an instruction that the jury should convict him based on the fact of those prior injuries, deprived him of due process of law.

There is no doubt that the horrific end to Tori McGuire's life is statistically and realistically too common. Regardless of trends and surveys, the Constitution may not be suspended because a crime is particularly repugnant.

> The rule excluding evidence of criminal propensity is nearly three centuries old in the common law... . California's codification of the common law rule (Evid. Code, §1101, subd.(a)) is absolute where it applies.

People v. Alcala, 36 Cal.3d 604, 630-631 (1984).

In this case, the prior injuries were not relevant to any issue in dispute. People v. Thompson, 27 Cal.3d 303-318 (1980). The prosecution posited an anticipated defense in order to permit impeachment of its own evidence. The fact of child abuse was proven and not disputed as the cause of death.

Evidence of "similar" crimes showing violent propensity, including testimony regarding Daisy's fear of McGuire, were tied together through the use of this instruction:

> Evidence has been introduced for the purpose of showing that the Defendant committed acts similar to those constituting a crime other than that for which he is on trial. Such evidence if believed, was not received, and

may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show three things:

1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the Defendant,

2. To establish the battered child syndrome, and

3. Also a clear connection between the other two offenses and the one of which the Defendant is accused, so that it may be logically concluded that if the Defendant committed other offenses, he also committed the crime charged in this case.

In discussing this instruction, the Ninth Circuit Panel determined that "[i]t permits the jury to make a direct determination of guilt by concluding that appellant committed prior bad acts." (Pet.A-13).

The panel cites the Advisory Committee Note regarding Federal Rules of Evidence 404(a) stating that rejection of such use is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions. (Pet.A-13) Petitioner characterizes this statement as "reliance" on the Federal Rules of Evidence rather than upon the Constitution, thereby expanding the remedy of habeas corpus. This is not the case. The jury went through a process of: 1) finding that Tori was abused; 2) concluding that the death was therefore not accidental; 3) that McGuire lied about an accident defense; 4) indicating a consciousness of guilt; 5) permitting a conviction of murder. (Pet-15) The entire process

hinges on the use by the prosecutor of the un-presented accident defense. This was not impeachment of a testifying defendant. It is argued that the prosecutor must rebut a defense of accident not claimed by the defense to avoid a "Catch-22" situation. Absolutely no authority, federal or state, is cited for the Catch-22 avoidance justification. Prosecutors have a familiar obligation to prove the offense beyond a reasonable doubt.

This is not a case where the panel was reversing a conviction based on the Federal Rules of Evidence to overturn a state conviction. Dowling v. United States, __ U.S. ___, 110 S.Ct. 668, 674 (1990). This is not a case where the writ was issued to correct a perceived error of state law. Pulley v. Harris, 465 U.S. 43, 104 S.Ct. 871, 875 (1984). This is a case where the admission of the evidence and the subsequent instruction "so infected the entire trial that the resulting conviction violated due process." Cupp v. Naughten, 414 U.S. 141, 147 (1973).

Without this error, Mcguire would have been on trial only for the charged crime of the murder of his child. Child abuse cases in both state and federal courts do present problems of proof, particularly when there is conflicting medical evidence, a course of conduct leading to death, or allegations that the death was caused by accident. None of the foregoing situations existed in this case. This was a murder. Murder presents problems of proof.

If the victim had been an adult, prior injuries, discovered in autopsy, with no link to the accused, would be inadmissible. The proof problems which led to the child abuse "exception" were not present in this case, yet the exception was allowed to swallow the rule.

The Ninth Circuit panel correctly perceived that the trial court permitted evidence and instructions which maximized the prejudice flowing from irrelevant evidence (Pet. A-71).

This evidence and its attendant instructions were so extremely unfair that their use violated those fundamental conceptions of justice which lie at the base of our institutions. United States v. Lovasco, 431 U.S. 783, 790, 97 S.Ct. 2044, 2048 (1977).

IV. CONCLUSION

The Ninth Circuit correctly determined that this evidence and the instruction to the jury for its use so infected the trial that McGuire was denied due process of law. Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MORRIS TAYLOR HAYS & HIGAKI
Ann Hardgrove Voris*
Attorney for Respondent
One Bush Street, Suite 200
San Francisco, CA 94114
Telephone: (415) 291-0500

*Counsel of Record

February 4, 1991

California Rules of Evidence

§1101. Character to Prove Conduct.

(a) Except as provided in this section and in Sections 1102 and 1103, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

Federal Rule 404

Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible;e for the purpose of proving action in conformity therewith on a particular occasion, except:

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show actin in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

MARK OWEN McGUIRE, Petitioner-Appellant, vs. WAYNE ESTELLE, Superintendent, California Men's Colony at San Luis Obispo, Respondent-Appellee.	)	No. 87-2522 D.C. No. C-85-6521 TEH

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

JOHN K. VAN DE KAMP, Attorney General
of the State of California

RICHARD B. IGLEHART
Chief Assistant Attorney General

JOHN H. SUGIYAMA
Senior Assistant Attorney General

HERBERT F. WILKINSON
Supervising Deputy Attorney General

DANE R. GILLETTE
Deputy Attorney General

350 McAllister Street, Room 6000
San Francisco, California 94102
Telephone: (415) 557-1475

Attorneys for Respondent-Appellee

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK OWEN McGUIRE, Petitioner-Appellant, vs. WAYNE ESTELLE, Superintendent, California Men's Colony at San Luis Obispo, Respondent-Appellee.	)	No. 87-2522 D.C. No. C-85-6521 TEH

PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

INTRODUCTION

In an opinion filed on May 8, 1989, a panel of this Court reversed the District Court's order denying a petition for writ of habeas corpus, and ordered the State of California to grant petitioner a new trial. This petition for rehearing and suggestion for rehearing en banc is filed within 14 days, as required by Federal Rules of Appellate Procedure [FRAP] 40.

Respondent believes that a rehearing is necessary in order to address material points of fact and law overlooked in the decision. Specifically, the panel relied upon an interpretation of the evidence on other injuries to the 6 month old murder victim which is both unsupported by the record and never argued by petitioner in this proceeding or in any state court. The panel only discusses a portion of the limiting

instruction relating to this evidence. Next, we note that the panel failed to discuss cited authority permitting the admission of other crimes evidence in child-killing cases, some of it from this Circuit. Finally, the panel opined that the prosecutor's grant of immunity to petitioner's wife was "questionable". That action was never objected to by petitioner in any proceeding; it was entirely inappropriate for the panel to consider it.

The panel also concluded that petitioner had adequately exhausted his state remedies, even though he had not presented certain of the issues raised to the California Supreme Court. A recent opinion of the United States Supreme Court, filed after this case was submitted but before it was decided, requires reconsideration of that holding and the precedent from this Circuit upon which it was based.

Respondent additionally suggests, pursuant to FRAP 35, that rehearing en banc is appropriate for two reasons. First, it is necessary to secure uniformity of decision within the Circuit. Other panels have recognized the admissibility of prior child abuse evidence in federal prosecutions; state court authorities and prosecutions should be evaluated similarly. Second, the question of when issues are viewed as exhausted by this Court is of critical importance to the State of California.

ARGUMENT

I.

FAILURE TO EARLIER PRESENT ISSUES RAISED IN HIS PETITION FOR HABEAS CORPUS TO THE CALIFORNIA SUPREME COURT IN HIS DISCRETIONARY PETITION FOR HEARING REQUIRES DISMISSAL OF THE PETITION FOR FAILURE TO EXHAUST STATE REMEDIES.

As did the District Court, the panel rejected respondent's argument that petitioner failed to exhaust state remedies with respect to two of the issues raised in his petition for writ of habeas corpus. It is conceded that petitioner raised all of his issues in the California Court of Appeal, but it is asserted that he presented only two of them in a petition for hearing to the California Supreme Court. The panel concluded, relying on *Maxwell v. Sumner*, 673 F.2d 1031 (9th Cir. 1982), that presentation of any issue in the hearing petition was sufficient to exhaust all issues under the state court's former rules of procedure. Slip opn. at 4832-4833. We submit that *Maxwell* should be reconsidered in light of the recent decision of the United States Supreme Court in *Castille v. Peoples*, ___ U.S. ___, 109 S.Ct. 1056 (1989).

In *Maxwell*, this Court concluded that it was unnecessary for a defendant to specifically raise an issue in a petition for hearing to the California Supreme Court so long as it was raised in the California Court of Appeal. Since a grant of review under the procedure applicable to petitioner's case, see slip opinion at 4833-4834, n. 1, vacated the lower court opinion, issues not raised in the petition were not waived for

purposes of later consideration by the Supreme Court. This Court recognized that the "purpose of a petition for a hearing in the California Supreme Court is to convince that court to exercise its *discretion* to hear the case." 673 F.2d at 1034, n. 1 (emphasis added).

The issue in *Castille, supra*, was the significance for federal exhaustion purposes of the denial of a petition for allocatur by the Pennsylvania Supreme Court. Under Pennsylvania law, such review is not a matter of right but depends on an exercise of sound judicial discretion. 109 S.Ct. at 1058. The Supreme Court concluded that denial of a request for discretionary review does not, in and of itself, constitute fair presentation of an issue to the state court for federal exhaustion purposes. 109 S.Ct. at 1060. This holding is particularly significant in petitioner's case.

The Supreme Court has required that, in order to be exhausted, an issue be "fairly presented" to the state court in the same manner that it is raised in the federal habeas corpus petition. *Castille, supra*, 109 S.Ct. at 1060; *Picard v. Connor*, 404 U.S. 270, 275 (1971). The same legal theory and underlying facts must be presented. *Gibson v. Scheidemantel*, 805 F.2d 135, 138 (3rd Cir. 1986). For example, a claim that the state trial court abused its discretion in applying a state rule of criminal procedure is "entirely different" from an argument challenging the constitutionality of that rule as applied in the circumstances of a particular case. State courts must be allowed

to consider the implications of a constitutional attack. *Boggs v. Evitts*, 818 F.2d 534, 536 (6th Cir. 1987).

In this case, petitioner not only failed to argue to the state courts that other crimes evidence issue raised a federal constitutional claim, he did not present two of the issues in the habeas corpus petition *at all* to the California Supreme Court. If, as *Castille* holds, denial of discretionary review does not constitute exhaustion, failure to even present the issue to such review must be viewed as inadequate. The fact that grant of hearing would ultimately have allowed all of the California Court of Appeal issues to be argued is irrelevant; it is impossible to know whether the California Supreme Court would have found the omitted issues provided more compelling reasons to grant review, even if those actually presented did not. Respondent submits that the *Maxwell* view (for exhaustion purposes) of prior California procedure cannot survive the holding in *Castille*.

The fact that the issue upon which this Court reversed the state court murder conviction was presented to the California Supreme Court is not significant, even assuming that the form of its presentation was adequate exhaustion. This Court has "read *Rose v. Lundy* [455 U.S. 509 (1982)] as requiring dismissal of the entire petition without reaching the merits of any of its claims where exhausted and unexhausted claims are combined. [Citations omitted]. The Supreme Court's direction to dismiss such 'mixed petitions' is clear and unequivocal, and leaves no discretion to

consider hypothetically the claims which had been exhausted." *Szeto v. Rushen*, 709 F.2d 1340, 1341 (9th Cir. 1983). Because other claims remained unexhausted, the District Court (and thus, the panel) should have dismissed the entire petition.

Respondent urges this Court to grant rehearing in light of *Castille*. Given the significance of that decision and its impact on the circuit's view of California procedure, rehearing en banc is appropriate.

II.

THE PANEL'S HOLDING THAT IT WAS ERROR TO INTRODUCE EVIDENCE DEMONSTRATING PRIOR INCIDENTS OF CHILD ABUSE IGNORES THE FACTS IN THE CASE, RELIES UPON AN INCOMPLETE ANALYSIS OF THE LIMITING INSTRUCTION, AND OVERLOOKS FEDERAL AUTHORITY RECOGNIZING THE ADMISSIBILITY OF SUCH EVIDENCE.

The panel concluded that petitioner was prejudiced by the admission of evidence demonstrating prior acts of child abuse and by a jury instruction relating to that evidence. The decision is factually and legally inaccurate and should be reconsidered, for several reasons.

The panel referred more than once to evidence that Tori, the six-month old victim, had suffered "sexual abuse." Slip opinion at 4835. Respondent assumes this is a reference to evidence that she had sustained damage to her anus. There was *never* any suggestion, either by the prosecutor in argument or in any of the testimony presented by the state, that the injury was sexual in nature. Moreover, Daisy McGuire, defendant's wife and the child's mother, testified that she had pulled down on Tori's bowels a week or two before the child was killed because she was having trouble defecating. RT 406.[1] There is no basis in the record for concluding that the jury viewed this evidence as demonstrating sexual abuse of the child.

1. RT refers to the transcript of the state court proceedings, all of which were lodged by Respondent with the District Court.

The panel also asserted that the prior abuse evidence was only marginally relevant, because petitioner did not claim at trial that Tori's death was accidental. It expressly criticized the prosecutor's decision to introduce petitioner's statements to the police (in which he offered an accident defense), then impeach those assertions with the evidence of "Battered Child Syndrome." Slip opn. at 4835. The criticism ignores the fact that the prosecutor was obligated to prove death by a criminal agency; it suggests no federal constitutional prohibition against demonstrating the falsity of petitioner's statements to the police. California law specifically authorizes the prosecutor to introduce such evidence to show consciousness of guilt. *People v. McDowell*, 234 Cal.App.2d 54, 56-57 (1965). Federal courts have also recognized that it is appropriate to anticipate and counter defenses by use of other crimes evidence in the prosecutor's case-in-chief. *United States v. Lewis*, 759 F.2d 1316, 1349, n. 14 (8th Cir. 1985); *United States v. Evans*, 697 F.2d 240, 248, n. 8 (8th Cir. 1983). Petitioner should not be allowed to profit by his lies to the police, simply because he abandoned his first line of defense. The fact that he lied was relevant and probative evidence which the prosecutor was entitled to present to the jury.

The panel then found that the error in admitting the other crimes evidence was exacerbated by the trial court's limiting instruction. It concluded that, standing alone, the instruction would "probably" constitute error of constitutional

dimension. Slip opn. at 4837. This is not the test. Rather, it must be specifically shown that the instruction so infected the entire trial that the conviction violated due process. *Cupp v. Naughton*, 414 U.S. 141, 147 (1973); *Quigg v. Crist*, 616 F.2d 1107, 1111 (9th Cir. 1980).

More disquietingly, the panel quoted only a portion of the instruction. The jury was specifically advised that other crimes evidence was not intended to show bad character or criminal disposition,[2] a limitation which this Court found to be significant in *Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985). *Butcher* was one of the cases cited in the panel opinion. Slip opn. at 4837. As this Court recognized in *United States v. Winters*, 729 F.2d 602, 604 (9th Cir. 1984) (the other case cited in the panel opinion), it must be assumed that the jury followed the limiting instructions. *See also, Parker* v. *Randolph*, 442 U.S. 62, 73 (1979).

To the extent that the instruction would permit an inference of guilt based on the prior incidents of child abuse, such an inference is expressly permitted by the federal courts in infanticide or child abuse cases. *See, e.g., United States v. Woods*, 484 F.2d 127, 133 (4th Cir. 1973); *United States v.*

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2. The panel excised the following admonition in its discussion of the instruction: "Such evidence if believed, was not received, and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes." CT 756-757. It is fundamental that the jury instructions must be considered as a whole. *Francis* v. *Franklin*, 471 U.S. 307, 315 (1981).

Harris, 661 F.2d 138, 142 (10th Cir. 1981); *United States v. Leight*, 818 F.2d 1297, 1304 (7th Cir. 1987). This Court has followed *Woods* in a federal prosecution. *United States v. Lewis*, 837 F.2d 415, 419 (9th Cir. 1988) (evidence of prior child abuse was admissible because of its "probative value in disproving claims that the defendant lacked intent or that the child died by accident"). The state prosecutor in this case had precisely the same interest. The panel's failure to consider any of the federal authority cited to it by respondent compels reconsideration. The blunt fact is that neither admission of the evidence, nor giving of the instruction, nor both, denied petitioner due process.

III.

THE PANEL'S OPPOSITION TO THE STATE'S DECISION TO GRANT IMMUNITY TO PETITIONER'S WIFE IS AN IMPROPER BASIS UPON WHICH TO GRANT THE PETITION.

In its conclusion, the panel expressed an undisguised distaste over the prosecutor's decision to grant Daisy McGuire immunity from prosecution, and even suggested that the state re-examine that decision and possibly withdraw the immunity. Slip opn. at 4837. Those observations were entirely inappropriate.

First, there was never any objection, in any court, by petitioner to the grant of immunity. Indeed, under California law, he had no standing to object. *People v. Randolph*, 4 Cal.App.3d 655, 660 (1970). The same rule obtains in federal prosecutions. *United States v. Ellis*, 595 F.2d 159, 163 (3rd Cir. 1979.)

Second, federal courts have "no supervisory authority" over state judicial proceedings. *Smith v. Phillips*, 455 U.S. 209, 221 (1982). Even in a federal prosecution, the decision to grant or deny immunity belongs exclusively to the executive branch. *United States v. Mendia*, 731 F.2d 1412, 1414 (9th Cir. 1984); *Snelling v. United States*, 719 F.2d 1067, 1068, n. 3 (10th Cir. 1983).

Finally, the Court's implied criticism, that the prosecutor may have let the guilty party go free, ignores a substantial amount of contrary evidence: (1) the testimony of a woman in the hospital waiting room who heard Mrs. McGuire ask petitioner what had "really happened" to Tori while she was in

his exclusive custody, RT 174-179; (2) Mrs. McGuire's complaints to neighbors and friends about the way petitioner treated Tori, RT 470, 496, 498; (3) the testimony of a neighbor who saw petitioner pinch Tori's face while forcing food into her mouth, RT 469-470; and (4) Mrs. McGuire's attempt to exonerate petitioner from the stand, despite inconsistencies with her prior statements and the grant of immunity. RT 342, 348. In short, there was substantial evidence of petitioner's guilt, and the jury was fully aware of his wife's status in the case and her efforts to assist him. Because the panel impermissibly relied upon the immunity grant as a basis for reversing the conviction, this Court should grant a rehearing.

CONCLUSION

For the reasons stated above, respondent respectfully submits that a rehearing or rehearing en banc should be granted.

Dated: May 19, 1989

JOHN K. VAN DE KAMP, Attorney General
of the State of California

RICHARD B. IGLEHART
Chief Assistant Attorney General

JOHN H. SUGIYAMA
Senior Assistant Attorney General

HERBERT F. WILKINSON
Supervising Deputy Attorney General

DANE R. GILLETTE
Deputy Attorney General

Attorneys for Respondent-Appellee

DRG:chv
SF87FA0007

PROOF OF SERVICE BY MAIL

I, the undersigned, declare:

I am over the age of eighteen years and not a party to the within entitled action; I am employed within the City and County of San Francisco where this mailing occurs; my business address is One Bush Street, Suite 200, San Francisco, California 94104.

On February 4, 1991, I served the foregoing document described as:

RESPONDENT'S BRIEF IN OPPOSITION and
RESPONDENT'S MOTION TO FILE OPPOSITION BRIEF
IN FORMA PAUPERIS

on the interested party(ies) in this action by causing a true copy thereof to be placed in a sealed envelope addressed as follows:

John Van De Kamp
Dane Gillette
Office of the Attorney General
State of California
455 Golden Gate Ave., Suite 6200
San Francisco, CA 94102

Mark O. McGuire - C478337
P.O. Box 8101
Room 2180
San Luis Obispo, CA 93409-0001

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with first class postage thereon fully prepaid at San Francisco, California, in the ordinary course of business.

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Mae F. Dyson

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Supreme Court of the United States

No. 90-1074

Wayne Estelle, Warden,

Petitioner

v.

Mark Owen McGuire

ORDER ALLOWING CERTIORARI. Filed February 25, 1991.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

February 25, 1991

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SUPREME COURT OF THE UNITED STATES

No. 90-1074

WAYNE ESTELLE, WARDEN (Petitioner) vs. MARK OWEN McGUIRE (Respondent)

The Clerk will enter my appearance as Counsel of Record for MARK OWEN McGUIRE

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☒ Respondent(s) ☐ Amicus Curiae

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature [signature]

(Type or print) Name ANN HARDGROVE VORIS

☐ Mr. ☒ Ms. ☐ Mrs. ☐ Miss

Firm MORRIS TAYLOR HAYS & HIGAKI

Address One Bush Street, Suite 200

City & State San Francisco, California Zip 94104

Phone (415) 291-0500

Rule 5

APPEARANCE OF COUNSEL

.1. An attorney seeking to file a pleading, motion, or other paper in this Court in a representative capacity must first be admitted to practice before this Court pursuant to Rule 5. The attorney whose name, address, and telephone number appear on the cover of a document being filed will be deemed counsel of record, and a separate notice of appearance need not be filed. If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record must be clearly identified.

.2. An attorney representing a party who will not be filing a document must enter a separate notice of appearance as counsel of record indicating the name of the party represented. If an attorney is to be substituted as counsel of record in a particular case, a separate notice of appearance must also be entered.

90-1074

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WAYNE ESTELLE, WARDEN, Petitioner, v. MARK OWEN McGUIRE, Respondent.	)	No.

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DANE R. GILLETTE, a member of the Bar of the Supreme Court of the United States, states:

That my business address is 455 Golden Gate Avenue, Room 6200, in the City and County of San Francisco, State of California; that on December 14, 1990, I serve true copies of the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in the above-entitled matter on counsel for respondent by placing same in envelope addressed as follows:

Ann Hardgrove Voris
Morris, Taylor, Hays & Higaki
One Bush Street, Suite 200
San Francisco, California 94104

Said envelope was then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

DANE R. GILLETTE
Deputy Attorney General